Supreme Court, U.S.
FILED
AUG 14 1995
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(2)

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

No. 95-73

CARGILL, INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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August 14, 1995

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

ARGUMENT 3

I. THIS COURT'S GUIDANCE IS NEEDED TO DELINEATE THE SCOPE OF CRITICAL AND FAR-REACHING FEDERAL WATER POLLUTION LEGISLATION 3

A. Identification as a "Water of the United States" Triggers Extensive Permitting Requirements 5

B. The Ninth Circuit's Interpretation of "Waters of the United States" Encompasses Vast Areas of Normally Dry Land 6

C. The Ninth Circuit's Interpretation of "Waters of the United States" Would Affect the Use of Private, Artificial Ponds and Impoundments 8

D. The Ninth Circuit Has Provided an Impermissibly Vague Standard for Assessing Harsh Civil and Criminal Penalties 11

II. THE MANDATORY PENALTY ASPECT OF THE NINTH CIRCUIT'S DECISION WARRANTS REVIEW IN AND OF ITSELF 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Avoyelles Sportsmen's League, Inc. v. *Alexander*, 473 F. Supp. 525 (W.D. La. 1979)..... 5

Connally v. *General Const. Co.*, 269 U.S. 385 (1926) 15

Hoffman Homes, Inc. v. EPA, 961 F.2d 1310, *vacated*, 975 F.2d 1554 (7th Cir. 1992)..... 14

Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993)..... 14

Kolender v. *Lawson*, 461 U.S. 352 (1983)..... 16

Laguna Gatuna, Inc. v. Browner, et al., 58 F.3d 564 (10th Cir. 1995)..... 9

State Water Control Board v. *Train*, 559 F.2d 921 (4th Cir. 1977)..... 17

Tabb Lakes, Ltd. v. *United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table), 20 Envtl. L. Rep. 20008 8,13

Texas Municipal Power Agency v. *EPA*, 836 F.2d 1482 (5th Cir. 1988)..... 10

United States v. *Lopez*, 115 S.Ct. 1624 (1995) 5,14,15

United States v. *Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) 11

Page

United States v. *Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1966 (1995).... 12

United States v. *Pozsgai*, Cr. No. 8800450-01 (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990)..... 11

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)..... 4

United States v. *Suarez*, 846 F. Supp. 892 (D. Guam 1994) 15

West Virginia Coal Ass'n v. *Reilly*, 728 F. Supp. 1276 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table), 33 E.R.C. 1353 10

STATUTES AND REGULATIONS:

Clean Water Act, 33 U.S.C. § 1251 et seq. ..... passim

§ 101(a), 33 U.S.C. § 1251(a)..... 4
§ 301, 33 U.S.C. § 1311 6
§ 309(c), 33 U.S.C. § 1319(c)..... 11
§ 309(d), 33 U.S.C. § 1319(d) 11
§ 309(g), 33 U.S.C. § 1319(g) 18
§ 309(g)(1), 33 U.S.C. § 1319(g)(1) 18
§ 402, 33 U.S.C. § 1342 2,6,9
§ 404, 33 U.S.C. § 1344 2,4,5
§ 502(6), 33 U.S.C. § 1362(6) 6
§ 502(7), 33 U.S.C. § 1362(7) 3
§ 502(12), 33 U.S.C. § 1362(12) 6

33 C.F.R. § 323.2 - 323.4 (1994)..... 5

33 C.F.R. § 323.3(b) (1994) 10

	Page
33 C.F.R. § 328.3(a) (1994)	6
40 C.F.R. § 122.2 (1994)	6
PUBLIC LAWS:	
Water Quality Act of 1987, Pub. L. No. 100-4, § 314, 101 Stat. 46 (1987)	18
FEDERAL REGISTER:	
51 Fed. Reg. 41,206 (1986)	8
58 Fed. Reg. 7,610 (1993)	17
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 104-112, 104th Cong., 1st Sess. (1995)	11
H.R. Rep. No. 104-112, 104th Cong., 2nd Sess. (1995)	17
S. Rep. No. 92-414, 92nd Cong., 1st Sess. (1971)	4

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INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber, and manufacture pulp, paper, and paperboard products and solid wood products. Its member companies account for over 8% of total U.S. manufacturing output. *Amicus Curiae* the Chemical Manufacturers Association is a non-profit trade association whose members represent 90 percent of the productive capacity for basic industrial chemicals in this country. The *amici* therefore have a vital interest in the regulation of "waters of the United States," as applied to temporarily wet areas that may be present on land owned or used by such companies and as applied to surface impoundments used in manufacturing and forestry.

The *amici* represent companies which own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. In addition, these companies rely on timber from the over 250 million acres of private, nonindustrial forest land. These lands undoubtedly contain many isolated areas where topographical depressions occasionally collect rainfall runoff. The *amici* also represent companies which own and operate hundreds of man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

If every such surface impoundment and every isolated, low-lying area were considered "waters of the United States" subject to regulation under the federal Clean Water Act ("CWA") merely because they have the potential to be used by migratory birds or endangered species, then these companies could find that their intended use of their lands and the continued operation of their man-made impoundments would be constrained by the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") permit requirements.[1]

Thus, the *amici* have a direct and immediate interest in the issues presented in this case, which concern fundamental aspects of how the activities of their member companies may be subject to federal

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1 While this case concerns Corps regulations under section 404 of the CWA, 33 U.S.C. § 1344, the extent of "waters of the United States" also dictates EPA jurisdiction to require permits for discharges to such waters under CWA section 402, 33 U.S.C. § 1342.

regulation and whether they can reasonably know what conduct is prohibited. Moreover, since the Ninth Circuit's definition of "waters of the United States" is so broad and so vague that it could apply to almost any property, almost any of the *amici's* members (and countless other landowners) could be subjected to harsh civil or criminal penalties if the government chooses to assert that the member's particular property and activity fall under CWA jurisdiction.

Amici therefore can help provide this Court with a broader perspective on the pernicious effects that the Ninth Circuit's overextension of CWA jurisdiction, as well as its removal of the district courts' discretion to impose civil penalties, could have on manufacturing and forestry throughout the country.[2]

ARGUMENT

I. THIS COURT'S GUIDANCE IS NEEDED TO DELINEATE THE SCOPE OF CRITICAL AND FAR-REACHING FEDERAL WATER POLLUTION LEGISLATION

This case concerns the central issue in determining the applicability of virtually all of the regulatory controls imposed by the federal CWA, 33 U.S.C. § 1251 *et seq.* If an area is considered to be a "navigable water," defined to mean a "water of the United States" in CWA section 502(7), 33 U.S.C. § 1362(7), then the Corps has authority to restrict or

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2 Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court.

prohibit the discharge of dredged or fill materials into that area, under CWA section 404, 33 U.S.C. § 1344.

On the threshold question of whether wholly isolated "waters" fairly come within the meaning of "waters of the United States," the issue which this Court expressly reserved in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1985), the Ninth Circuit in *Leslie Salt II* implicitly concluded that they do, without any reference to legislative history or to any judicial decision involving a wetland or "other water" with no connection to navigable-in-fact waters.[3] The Ninth Circuit then removed essentially any limitation on the breadth of Corps permitting jurisdiction by concluding that any use (or apparently even potential for use) by migratory birds or endangered species is sufficient to bring an isolated "other water" within the reach of federal jurisdiction under the Commerce Clause.[4] The effect of these Ninth Circuit rulings is

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3 There is nothing in the objectives of CWA § 101(a), 33 U.S.C. § 1251(a), nor in the legislative history of the CWA, that suggests Congress intended to address areas which only occasionally collect water (or man-made excavations), if those areas have no potential impact upon traditional navigable waters or even on any other surface water body. Rather, the legislative history demonstrates that Congress was concerned about waters with some connection to and potential impact upon other surface waters. In discussing the geographic scope of the Clean Water Act, Congress spoke of a need to control the discharge of pollutants at its source because "water moves in hydrologic cycles," S. Rep. No. 92-414, 92nd Cong., 1st Sess. 77 (1971), but therefore concluded that controls must be applied "to the navigable waters, portions thereof, and their tributaries." *Id.*

4 This interpretation is particularly striking in light of the explicit recognition in the case below that "[t]here is no

that CWA permitting requirements could be applied to vast additional areas of the country, and potentially regulated companies and individuals have only vague guidance as to whether they are subject to the Act. This scant guidance was further beclouded by the Ninth Circuit's halting affirmation in *Leslie Salt IV*.

A. Identification as a "Water of the United States" Triggers Extensive Permitting Requirements

Under CWA section 404, 33 U.S.C. § 1344, a Corps permit is required in most instances prior to discharging dredged or fill materials into a "water of the United States." Under the Corps regulations, this means that a permit may be required for dredging of the area, grading or road construction, or even mechanically clearing the land. *See* 33 C.F.R. §§ 323.2-323.4 (1994) and, *e.g., Avoyelles Sportsmen's League, Inc. v. Alexander*, 473 F. Supp. 525 (W.D. La. 1979). Various forestry or farming practices may involve activities

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suggestion in the language of the Act that isolated waters used only by migratory birds fall within its ambit." 55 F.3d at 1394, Pet App. at A-11. There is nothing in the record to suggest that any use of an area by migratory birds or endangered species, no matter how insignificant, has a substantial impact on interstate commerce. The mere potential for such use is even further removed. Nor is there any reason to believe that areas which collect water only after heavy rainfall, or artificial ponds that are used for industrial or commercial activity, would be expected to have a substantial effect on migratory birds or endangered species, in any event. It is now clear that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that "the regulated activity 'substantially affects' interstate commerce." *U.S. v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

which, if conducted on land considered to be "waters," would constitute the discharge of dredged or fill material, particularly during road construction, harvesting, and replanting.

The effect of a broad definition of "waters of the United States" extends even further, however. Under the Act, a permit is required for any addition of any pollutant to waters of the United States from a point source. 33 U.S.C. §§ 1311, 1342 & 1362(12). The regulatory definition of "waters of the United States" promulgated by EPA is virtually identical to the Corps' definition of the same term which was applied by the Ninth Circuit in the case below. *Cf.* 40 C.F.R. § 122.2 (1994) *with* 33 C.F.R. § 328.3(a) (1994). Thus, an area determined to be a "water of the United States" is not only subject to Corps permitting requirements for any discharge of dredged or fill material but also is subject to EPA CWA section 402 discharge permit requirements for any point source discharge of "pollutants" to the area.[5]

B. The Ninth Circuit's Interpretation of "Waters of the United States" Encompasses Vast Areas of Normally Dry Land

The definition of "waters of the United States" advanced by the Corps and accepted by the Ninth Circuit in the case below is so broad that it could be used to impose these Corps and EPA permitting requirements on the use of practically any land. The salt crystallizers at issue in the instant case were located in an area that had been pasture land in the past, 896

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5 "Pollutant" is defined very broadly in CWA § 502(6), 33 U.S.C. § 1362(6), encompassing a wide range of both process and non-process water discharges.

F.2d at 355, Pet. App. at A-39, and were "constructed on dry land." 700 F. Supp. at 480, Pet. App. at A-61. The temporarily wet areas "have no hydrological connection to any other body of water," and "for much of the year they do not even exist." 55 F.3d at 1395, Pet. App. at A-12.[6]

There is no reason to believe that Congress intended CWA jurisdiction to extend to the vast areas of the country where water may pond or soils may be saturated temporarily after rainfall or snowmelt on normally dry ground. As acknowledged even in the court below, "[c]learly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977." 55 F.3d at 1394, Pet App. at A-11. Even if it did, however, the Constitution would still require some connection to interstate commerce to authorize such action by Congress.

The Corps' interpretation at issue in this case, however, that an isolated "other water" has sufficient contacts with interstate commerce if it is "or would be" used as "habitat" by migratory birds or by an

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6 The district court in *Leslie Salt I* clearly rejected the Corps' assertion that the former salt crystallizers constituted "other waters" or "wetlands" because of occasional "ponding of water on otherwise dry land." 700 F. Supp. at 485, Pet. App. at A-73 to A-74. "After a rain that is heavy or long enough, any soil will become temporarily saturated. . . . [I]t is simply not enough that rain water collect on property for a few days for that property to become a water of the United States." *Id.* at 487, Pet. App. at A-77 to A-78. Yet the Ninth Circuit concluded in *Leslie Salt II* that the district court's findings were irrelevant for a determination of the Corps' jurisdiction over "waters of the United States." 896 F.2d at 360, Pet. App. at A-50.

endangered species, 51 Fed. Reg. 41,206, 41,217 (1986), is so broad that in practice it represents no limitation at all on Corps jurisdiction. Rather, it encompasses virtually all "waters" within the class of "waters of the United States" that the Corps asserts have sufficient ties to interstate commerce. The Corps' interpretation does not even require that migratory *water*fowl, or an endangered species with a water-based habitat, use or potentially use the site; in fact, the Corps has asserted jurisdiction over property because of its use by woodpeckers and songbirds. *See Tabb Lakes, Ltd. v. United States,* 715 F. Supp. 726, 728 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (Table) (reported at 20 Envtl. L. Rep. 20008).[7] In short, it is difficult to imagine an area of land that could not be considered "waters of the United States" under this expansive, though concededly not congressionally foreseen, definition.

C. The Ninth Circuit's Interpretation of "Waters of the United States" Would Affect the Use of Private, Artificial Ponds and Impoundments

Since the Ninth Circuit would apply CWA permitting requirements to man-made waters created by excavating dry land, 896 F.2d at 359-60, Pet. App. at A-47 to A-50, its conclusion that use or potential use by

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7 This Court can take judicial notice of the fact that birds such as woodpeckers and songbirds could make use of practically any undeveloped property, regardless of whether any significant ponding of water occurs there. While not reaching the issue, the district court expressed "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction. . . ." 715 F. Supp. at 729.

migratory birds provides sufficient connection to interstate commerce affects the utilization of countless man-made surface impoundments. This expansive jurisdiction would include thousands of ponds and conveyances created for commercial or industrial purposes (*e.g.*, raw (intake) water settling and treatment ponds; process water evaporation ponds, similar to Petitioner's salt crystallizers; log storage ponds used in the manufacture of pulp, lumber, or solid wood products; ponds constructed for storage of fire protection water or process water; or settling ponds used to control rainwater runoff from mining, construction, commercial, and similar activities) and numerous other man-made bodies of water, with no connection to natural surface waters.

Since most such surface impoundments have at least the potential to be used in some way by migratory birds, Corps permit requirements would apply to dredging of such impoundments or construction within such impoundments, which activities are frequently necessary for their effective use. Moreover, EPA wastewater discharge permitting requirements under CWA section 402, 33 U.S.C. § 1342, would presumably apply to any point source discharge of "pollutants" *into* such ponds.[8] Yet, these impoundments have no connection to or potential impact on any other surface

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8 *See, e.g., Laguna Gatuna, Inc. v. Browner, et al.*, 58 F.3d 564, 565 (10th Cir. 1995) (EPA issued cease and desist order to company that disposed of wastewater without a discharge permit into a privately-owned sinkhole, which, by EPA's own admission, "was not hydrologically connected to other waters and there were no recreational, industrial or other uses that could affect interstate commerce," based solely on the presence of some dead migratory birds near the sinkhole).

waterbody and clearly fall outside the scope of waters that the CWA was meant to address.

While the Corps' regulations exclude certain "artificial lakes or ponds" under 33 C.F.R. § 323.3(b) (1994), this exemption is so limited that it is little comfort to a potentially regulated plant manager or landowner. Among other problems,[9] the exclusion is circular: since the exclusion only applies to "excavating and/or diking dry land," 33 C.F.R. § 323.3(b) (1994), and since virtually every area which collected rainwater even temporarily may be considered by the Corps to have been "a water of the United States" even prior to excavation or diking, in many cases the Corps could assert that an artificially created surface impoundment was not created on dry land but was created in a "water of the United States."[10]

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9 The Corps and the Ninth Circuit have asserted that this exemption would apply only to artificially created waters "which are currently being used for commercial purposes." 896 F.2d at 360, Pet. App. at A-49. Moreover, the Corps asserts the right "on a case-by-case basis to determine that a particular waterbody within these categories" of artificially created waters *is* a "water of the United States." Id. at 359, Pet. App. at A-48. Similarly, EPA has argued that its "treatment pond exception is simply notice to polluters that it will not generally regulate" discharges into waste treatment ponds, "not a promise that it never will." *Texas Municipal Power Agency v. EPA,* 836 F.2d 1482, 1488 (5th Cir. 1988).

10 Similarly, EPA has argued that its waste treatment exclusion does not apply to any system constructed in an area that previously fell within EPA's overly broad definition of "waters of the United States." *See West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289-90 (S.D. W. Va. 1989), *aff'd*, 932 F.2d 964 (4th Cir. 1991) (Table), 33 E.R.C. 1353. As a result, "EPA has not consistently applied the

D. The Ninth Circuit Has Provided an Impermissibly Vague Standard for Assessing Harsh Civil and Criminal Penalties

While the cost and regulatory burden imposed by the Corps' and the Ninth Circuit's expansive definition of "waters of the United States" represents a tremendous potential impact on *amici* and other businesses, municipalities, and private citizens, the impact is greatly magnified by the harsh civil and criminal penalties available under the CWA. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides for a civil penalty of up to $25,000 per day for a violation of the prohibition on unpermitted discharges, while CWA section 309(c), 33 U.S.C. § 1319(c), could impose a criminal penalty of up to $25,000 per day of violation or imprisonment for not more than one year, or both, for even negligent violations.

The United States has been vigorously prosecuting companies and individuals for placing fill material in areas which the government considers wetlands or other "waters of the United States."[11] In

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regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 104-112, 104th Cong., 1st Sess. 147 (1995).

11 *See, e.g., U.S. v. Pozsgai,* Cr. No. 8800450-01, (E.D. Pa. July 13, 1989), *aff'd*, 897 F.2d 524 (3rd Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for filling a wetlands without a permit); *U.S. v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company fined $100,000 and its senior vice-president fined $10,000

fact, this Court recently denied a petition for *certiorari* in a case where, although the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," "[w]hich mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of 'discharging pollutants into navigable *waters* of the United States,'" nevertheless a father and son were each sentenced to 21 months incarceration for placing fill material on a waterfront lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *U.S. v. Mills,* 817 F. Supp. 1546 (N.D. Fla. 1993) (emphasis in original), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1966 (1995).

The companies and landowners faced with these severe potential penalties, however, have been provided few, if any, objective criteria by which to determine whether the use of their land requires a Corps or EPA permit.[12] Individuals today are thus faced with a situation even more egregious than that which the district court found "disturbing" in *Mills*. While the lot in that case had no standing water and did not "appear to be" a wetland or a marsh, swamp, or bog, at least it was located adjacent to a bay and had a depression that sometimes carried rainwater runoff from inland to the

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and given a suspended six-month sentence with one year probation for filling in wetlands without a permit).

12 Indeed, in the government's Brief in Opposition to Leslie Salt's Petition for Writ of Certiorari to the Ninth Circuit in *Leslie Salt II*, the government declared that EPA and the Corps "have decided to institute rulemaking proceedings on the question of their jurisdiction over isolated waters." *Id.* at 19. Yet, over four years have passed without so much as a word from the agencies on the subject.

bay. 817 F. Supp. at 1548. After the lower court decision here, though, a felony conviction could be based on activities in an area that is not near any surface water body and is either excavated in dry land or is a depression that is only temporarily wet after rainfall. It may be enough that the area merely has the potential to be used by migratory birds or endangered species,[13] or there may be some undefined level of actual use required. And apparently that use need not even have any connection to water; the decision below places no such qualification on "endangered species" nor "migratory birds," and in fact the district court's findings of migratory bird use were apparently based in part on sightings of upland birds.[14]

In fact, this uncertainty has become more pronounced in the wake of the Ninth Circuit's opinions.

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13 In fact, the Corps has already asserted that its jurisdiction can be founded on such a speculative basis. *See, e.g., Leslie Salt I,* 700 F. Supp. at 485, Pet. App. at A-73 ("The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use."); *Tabb Lakes, Ltd. v. United States,* 715 F. Supp. at 728 (Corps directive that "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States"). And the dissent in the Fourth Circuit *Tabb Lakes* decision suggests that use by ducks and geese may be enough, but that use by robins and finches may not. 20 Envtl. L. Rep. 20008 at n.2 (4th Cir. 1989).

14 *See* Petition at 6 n.4. It does, however, make a difference whether the birds are in the Fourth Circuit or in the Ninth Circuit. *See* Corps memorandum included as Appendix E to the Petitioners' Brief (supporting its Petition for a Writ of Certiorari in No. 90-792), explaining that, as a result of *Tabb Lakes*, the Corps intends to apply its migratory bird theory everywhere *but* the Fourth Circuit.

First, an area can be a water even though it only occasionally collects rainfall on otherwise dry land. 700 F. Supp. at 485 & 487, Pet. App. at A-74 & A-77 to A-78, *rev'd* 896 F.2d at 360, Pet. App. at A-49 to A-50. Second, it is unclear whether such an area must only have the potential to be used by migratory birds or must be used in fact, as well as the required extent of that potential or actual use.[15]

In the aftermath of these decisions, it is unclear whether the rule reaches potential use by migratory birds and endangered species or only actual use by such animals. If only potential use is sufficient, or, as the Seventh Circuit put it, "the regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial," *Hoffman Homes*, 999 F.2d at 261, then clearly the Corps interpretation does not pass constitutional muster. *See United States v. Lopez*, 115 S. Ct. at 1630. If instead some more substantial, actual

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15 *Cf.* 896 F.2d at 360, Pet. App. at A-50 *with* 361, Pet. App. at A-51. *Cf.* 55 F.3d at 1392, Pet. App. at A-5 *with* 1394-96, Pet. App. at A-10 to A-14. The confusion is compounded by decisions in other Circuits such as in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, *vacated*, 975 F.2d 1554 (7th Cir. 1992) where the 7th Circuit emphatically held that EPA's asserted jurisdiction over wetlands based on the potential use by migratory birds exceeded the limits of the CWA and the Commerce Clause, only to subsequently vacate that decision without opinion. The Seventh Circuit later upheld the agency's asserted jurisdiction based on "potential" affect on interstate commerce, but held that the evidence did not support the conclusion that the wetland in question could potentially be used by migratory birds because, ironically, there was no evidence that birds in fact were using the wetland. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261-62 (7th Cir. 1993).

use by migratory birds is required, then the *Leslie Salt* decisions and other cases addressing isolated waters have given no guidance on what use is sufficient.[16]

Simply put, the regulated community cannot ascertain the boundaries of the rule stated, applied, and restated in the *Leslie Salt* decisions. Such a nebulous and subjective standard for determining the applicability of the stringent civil and criminal penalties at issue here must be unconstitutionally vague.[17] *See, e.g., Connally*

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16 Even if something more than potential or minimal bird use is required by the regulation, that alone does not assure it is within the Corps' authority under the CWA or Congress' under the Commerce Clause. As noted in nn.3 and 4, *supra*, there is no legislative history indicating such a congressional intent or demonstrating that migratory bird use of isolated wetlands substantially affects interstate commerce. Nor is use by birds the type of commercial, economic activity normal within the commerce power. *See Lopez*, 115 S. Ct. at 1630-31.

17 The confusion surrounding the meaning of the *Leslie Salt* decisions is perhaps epitomized by the opinion of a federal district court (within the Ninth Circuit) concerning violations under the Clean Water Act. In *United States v. Suarez*, 846 F. Supp. 892 (D. Guam 1994), the court stated that *Leslie Salt II* "did not involve the issue of 'isolated' wetlands," and that the scope of CWA jurisdiction over isolated wetlands is "an unsettled area of the law." *Id.* at 893. In fact, emphasizing the "uncertain state of the law in [this] complex legal area," the court held that it was not unreasonable for defendant's counsel to fail to contest CWA jurisdiction over the isolated wetlands giving rise to the alleged violation. *Id.* at 893-94. Clearly landowners have not been fairly apprised of their obligations under the *Leslie Salt* decisions, when federal judges and CWA trial counsel appear baffled by their significance.

v. General Const. Co., 269 U.S. 385, 391 (1926) (statute which "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."); *Kolender v. Lawson*, 461 U.S. 352 (1983) (statute is unconstitutionally vague because it fails to describe with particularity what is required, encouraging arbitrary and discriminatory enforcement). The problem is aggravated by the fact that, after the Ninth Circuit's decision here, anyone who guesses wrong about the application of these uncertain and *ad hoc* criteria to his land is subject to a *mandatory* civil penalty.

II. THE MANDATORY PENALTY ASPECT OF THE NINTH CIRCUIT'S DECISION WARRANTS REVIEW IN AND OF ITSELF

The Ninth Circuit's determination, at 55 F.3d 1397, Pet. App. at A-16 to A-17, that a civil penalty must be imposed whenever a court finds a violation of the CWA has broad-reaching implications. It is also clearly erroneous and conflicts with holdings of the Fourth Circuit and several district courts.

The "mandatory penalty" aspect of the decision below obviously affects the tens of thousands of municipalities and industrial facilities that discharge wastewater to surface waters. The number of companies and individuals potentially subject to this mandatory penalty rule will be far greater, however, if the Corps' and EPA's expansive interpretation of "waters of the United States," as accepted by the Ninth Circuit, is allowed to stand. If any area of land that is wet for a minimal amount of time can be brought within CWA jurisdiction merely because it "may provide habitat to migratory birds" or endangered species, then countless landowners are in jeopardy of violating the CWA by filling or conducting work in an area they had no reason

to believe was a "water of the United States."[18] It is thus particularly inappropriate to ignore the rule of lenity (as discussed in Judge O'Scannlain's dissent below) and interpret CWA section 309(d) to impose mandatory penalties, since an individual may violate the statute merely because he failed to appreciate the counter-intuitive, case-by-case rule for determining jurisdictional "waters" that has now been endorsed by the opinion below.

The fact that the "mandatory penalty" ruling affects millions of businesses, municipalities, and private landowners subject to the CWA is reason enough for this Court to grant *certiorari*. In addition, though, the "mandatory penalty" decision below conflicts with the Fourth Circuit's decision in *State Water Control Board* v. *Train*, 559 F.2d 921, 927 (4th Cir. 1977) and dicta in this and other courts, as Cargill demonstrated in its petition. The decision is also clearly erroneous. As Judge O'Scannlain noted in his dissent below, the plain meaning of "shall be subject to" civil penalties is not the same as "shall pay" a civil penalty. 55 F.3d 1397-98, Pet. App. at A-17 to A-19. Even the

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18 EPA has acknowledged that its broad and uncertain assertion of CWA jurisdiction may result in EPA bringing an enforcement action for discharges to a water body that the discharger regarded as its own wastewater treatment system. National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7620-21 (1993). As a result, "companies and individuals today live under a very real fear that cooling ponds and surface impoundments they are using for waste treatment may suddenly be determined to be navigable waters, and subject to the full panoply of Clean Water Act requirements". H. R. Rep. No. 104-112, 104th Cong., 2nd Sess. 158 (1995).

majority below acknowledged that "shall be subject to" civil penalties "[a]t first glance . . . would seem to mean that while violators are subject to penalty, they may or may not be fined--that is, penalties are discretionary with the district court." *Id.* at 1397, Pet. App. at A-16.

The lower court placed substantial weight on the fact that Congress used the word "may" in conjunction with administrative penalties under CWA section 309(g), 33 U.S.C. § 1319(g), while the word "shall" is used in conjunction with judicial civil penalties under section 309(d). This reasoning has two fatal flaws. First, the structure of the two provisions is very different, with the judicial penalty provision stating in passive voice what penalties a violator is subject to, and the administrative penalty provision stating in active voice the Secretary's or Administrator's authority to assess administrative penalties. Even the majority below admits that "shall be subject to" suggests "at first glance," that a penalty may or may not be imposed; on the other hand, if Congress had used "shall" instead of "may" in the administrative penalty provision in section 309(g)(1) ("shall. . .assess. . .a civil penalty"), it would have unambiguously required mandatory administrative penalties.

Secondly, the opinion below ignores the fact that CWA section 309(g) was added more than 14 years after section 309(d) was enacted in the original Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314, 101 Stat. 46. Congress' use of the "Secretary. . . may . . . assess" structure in 1987 hardly suggests it intended the "any person who violates . . .shall be subject a civil penalty" formulation to have a different effect when it was drafted in 1972. Put another way, how could Congress have drafted section 309(g) any differently in the Water Quality Act of 1987 if it wanted to assure that the preexisting civil

penalty authority under section 309(d) would be understood to be discretionary rather than mandatory?

CONCLUSION

The Corps' assertion that "waters of the United States" includes isolated lands which are subject to only occasional saturation or ponding, or artificial ponds created on normally dry land, solely because those areas are or could be used by migratory birds or endangered species, is so broad as to subject vast additional areas of this country to Corps (and EPA) permitting requirements. The Corps and the Ninth Circuit have adopted an impermissibly vague and subjective standard for the crucial determination of whether CWA restrictions apply. Moreover, that nebulous standard directly conflicts with a decision of the Fourth Circuit. This Court's guidance is urgently needed to clarify the extent of federal jurisdiction under the CWA. There is also manifest need for this Court to review the critical and clearly erroneous conclusion below that district courts are constrained to impose a penalty for every CWA violation.

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August 14, 1995

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